IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE, CIVIL JURISDICTION

LETTERS PATENT APPEAL NO.112 OF 1992
IN
WRIT PETITION NO.2672 of 1984

Association of Engineering Workers having its office at 252, Janata Colony, R.N. Narkar Marg, Ghatkopar (East), Bombay-400 077. ..APPELLANTS

Versus

1.Smt.N.A. Kadam, Member, Industrial Court, Bombay.
2.The Official Liquidator, High Court, The Liquidator in Mafatlal Engineering Industries Ltd.,having his office at Bank of India Building, 5th Floor, M.G. Road, Fort, Bombay-23.....RESPONDENTS

Mr. N.M. Ganguli, for the Appellants.
None for the respondents.

CORAM: F.I. REBELLO & ANOOP V.MOHTA, JJ.
DATE : 1st September, 2004

ORAL JUDGMENT (PER F.I. REBELLO, J.)

1. Appellants were the original petitioners in a complaint which was filed before the Industrial Court, Thane. It was the contention of the complainant union that the workers had been suspended, but subsistence allowance had not been paid and consequently the complaint under Items 9 and 10 of Schedule IV of M.R.T.U. & P.U.L.P. Act 1971. The Industrial Court by its order of 22nd December, 1983 was pleased to dismiss the complaint in so far as the employees other than those working as Clerical staff, considering that those employees were governed by the Certified Standing Orders for hourly or daily rated workmen employed with the

respondent NO.2. The petitioners aggrieved impugned the said order before the learned Single Judge of this Court, who by his judgment dated June 25, 1992 dismissed the petition. It may be mentioned that the learned Judge in paragraph 3 has set out that the petitioners had invoked Article 227 of the Constitution of India. The petition in fact was filed under Articles 226 and 227 of the Constitution. From the judgment of the learned Single Judge it is not possible to find out as to whether the learned Judge treated the petition as under Articles 226 and 227 and consequently we are hearing the present Appeal.

2. On behalf of the appellants, their learned Counsel contends that the conditions of service of the workmen involved in the present appeal are governed by the Model Standing Orders and that being the case they are not entitled for any subsistence wages. It is submitted by the learned Counsel that even if it is held that the respondents had power to suspend, considering the Model Standing Orders and the suspension was an interim suspension pending the enquiry, the workmen would be entitled to full wages. In the alternative it is submitted that if it is held that the Certified Standing Orders apply then also considering Section 10A of the Industrial Employment (Standing Orders) Act, 1946 the workmen would be entitled to subsistence allowance. It is submitted that merely because the workmen had not referred to Section 10A cannot result in depriving them of the benefits if otherwise in law they are entitled to. Our attention has been invited to the judgment of the

Apex Court in the case of **The Management Hotel Imperial, New Delhi and Ors. v. Hotel Workers' Union, AIR 1959 SC.1342**, **Balvantrai Ratilal Patel v. State of Maharashtra, AIR 1968 S.C. 800,** and the judgment of the Constitution Bench of the Apex Court in the case of **V.P.Gindronia v. State of Madhya Pradesh, AIR 1970 SC 1494** in support of the submissions. Reliance was also placed on the judgment of the Division bench of this Corut in **the case of May & Baker Ltd. v. Shri Kishore Jaikrishandas Ichaporia & Ors.,** wherein considering Section 10A of the Industrial Employment (Standing Ordders) Act, as amended in the State of Maharashtra the learned Division Bench held that the provisions of Section 10A even when there are Certified Standing Orders would apply and payment would have to be made in terms of Section 10A.

3. The law in the matter of payment during the period of suspension in our opinion has been settled by various judgments of the Apex Court. The law as earlier declared has been redeclared by the Constitution Bench in V.P. Gindroniya (supra). In the matter of suspension the settled position is that the power to suspend is not an implied term in an ordinary contract between master and servant, such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. Ordinarily in the absence of such a power either under the express terms of the contract or under the rules framed under some statute it would mean that the master would have no power to suspend a workman and even if he does so, in the sense that he

forbids the employee to work, he will have to pay the wages during the so-called period of suspension. Where, however, there is power to suspend either in the contract or employment or in the statute or the rules framed thereunder the suspension has the effect of temporarily suspending the relationship of master and the servant with the consequence that the servant is not bound to render service and the master is not bound to pay.

. With the above, we may now consider the Certified Standing Orders applicable to the establishment.

Certified Standing Order 23(1) reads as under:-

> "23(1) A workman against whom any action is proposed to be taken for misconduct may be suspended pending the enquiry or for the period, if any, allowed to him for giving his explanation. The order of suspension may taken effect immediately on its communication to the workman. If as a result of the inquiry held or explanation tendered, it is decided not to take any action under standing order 23(3) the workman shall be deemed to have been on duty and shall be entitled to full wages and all privileges for the period of suspension.

It is, therefore, clear from the reading of this Certified Standing Order that there is a power to suspend. There is no provision for payment of subsistence wages. The only provision as contained in the Standing Orders is that on the enquiry held or

explanation tendered if the management decides not to take any action under Standing Order 23(3) the the workman would be entitled to full wages and all privileges during the period of suspension. Apart from that there is no provision for payment of wages during the period of suspension. Applying the well known test as set out by earlier it would be clear that the workmen would not be entitled to payment of subsistence wages at least under the standing orders as they stood.

4. The learned Counsel for the appellant however, seeks to contend that on a reading of the judgments earlier adverted to the workmen are entitled to subsistence allowance. Let us examine the said judgments to find out whether this submission has merit. It is not necessary for us to advert to the judgments in the case of the Management, Hotel Imperial (supra) and Balvantrai Ratilal Patel (supra) as both the judgments have been considered by the Constitution Bench in V.P. Gindroniya (supra). The Apex Court noted that there are 3 kinds of suspensions; (1) A public servant may be suspended as a mode of punishment; (2) he may be suspended during the pendency of an enquiry against him if the order appointing him or statutory provisions governing his service provide for such suspensions and (3) Lastly he may merely be forbidden from discharging his duties during the pendency of an enquiry against him which act is also called suspension. The Apex Court further observed that the right to suspend as a measure of punishment as well as the right to suspend the contract or service during the pendency of an enquiry are both

regulated by the contract of employment or the provisions regulating the conditions of service at the same time keeping in force the master's obligations under the contract. In other words the master may ask his servant to refrain from rendering his service but he must fulfil his part of the contract. Referring to the judgment in Management of Hotel Imperial, New Delhi in the matter of suspension and payment of wages this is how the Apex Corut has set out the law as set out in Management of Hotel Imperial:-

> "Therein this Court observed that it was well settled that under the ordinary law of master and servant the power to suspend the servant without pay could not be implied as a term in an ordinary contract of service between the master and the servant, but must arise either from an express term in the contract itself or a statutory provision governing such contract. It was further observed therein that ordinarily in the absence of such a power either in express terms in the contract or under the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work he will have to pay the wages during the so-called period of suspension. Where, however, there is power to suspend either in the contract or employment or in the statute or the rules framed thereunder, the suspension has the effect of temporarily suspending the relationship of

master and the servant with the consequence that the servant is not bound to render service and the master is not bound to pay."

It would, therefore be clear from the judgment of the Constitution Bench that where there is a power to suspend the master is not bound to pay unless the Standing Orders, Rules and Regulations so provide.

Then considering the judgment in Balvantray Ratilal Patel (supra) the Apex Corut once again reiterated the law in the following words:-

"Therein the legal position was stated thus: The general principle is that an employer can suspend an employee of his pending an enquiry into his misconduct and the only question that can arise in such a suspension will relate to the payment of his wages during the period of such suspension. It is now well settled that the power to suspend, in the sense of a right to forbid a employee to work, is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. Ordinarily, therefore, the absence of such a power either as an express term in the contract or in the rules framed under some statute would mean that an employer would have no power to suspend an employee of his and even if he does so

> in the sense that he forbids the employee to work, he will have to pay the employee's wages during the period of suspension.. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the order of suspension has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. It is equally well settled that an order of interim suspension can be passed against the employee while an enquiry is pending into his conduct even though there is no such term in the contract of employment or in the rules, but in such a case the employee would be entitled to his remuneration for the period of suspension if there is no statute or rule under which it could be withheld."

From the law as declared by the Apex Corut therefore, it is clear that where there is a power to suspend unless there is a provision for providing for subsistence allowance or wages during the period of suspension there would be no power in a Court to direct payment of subsistence allowance. We, therefore, find that there is no infirmity in the judgment of either Industrial Court or the learned Single Judge on that count.

7. We may, however, note that the provisions of Industrial Employment (Standing Orders) 1946 had been

amended and Section 10A has been introduced which reads as under:-

"10A. Payment of subsistence allowance:-(1) Where any workman is suspended by the employer pending investigation or inquiry into complaints or charges of misconduct against him, the employer shall pay to such workman subsistence allowance.

(a) at the rate of fifty per cent of the wages which the workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension; and

(b) at the rate of seventy-five per cent of such wages for the remaining period of suspension if the delay in the completion of disciplinary proceedings against such workman is not directly attributable to the conduct of such workman.

(2) if any dispute arises regarding the subsistence allowance lpayable to a workman under sub-section (1) the workman or the employer concerned may refer the dispute to the Labour Court, constituted under the Industrial Disputes Act, 1947 (14 of 1947), whichin the local limits of whose jurisdiction the industrial establishment wherein such workman is employed is situate and the Labour Corut to which the dispute is so referred shall, after giving the parties an

opportunity of being heard, decide the dispute and such decision shall be final and binding on the parties.

(3) Notwithstanding anything contained in the foregoing provisions of this section, where provisions relating to payment of subsistence allowance under any other law for the time being in force in any State are more beneficial than the provisions of this Section, the provisions of such other law shall be applicable to the payment of subsistence allowance in that state."

From a reading of this Section it is clear that during the pendency of an enquiry or pending investigation if a workman is suspended then subsistence wages/allowance to be paid in the manner set out. The language of the Section is clear. The certified Standing Orders are nothing but a contract having a statutory flavour. The provisions of the Act, therefore, override the provisions of the said Certified Standing Orders. The Division Bench of this Court has noted so in the case of May & Baker Ltd. (supra). We are, therefore, of the opinion that though under the Certified Standing Orders the workmen represented by the petitioners and who are suspended would not be entitled to subsistence allowance, however, they would be entitled to subsistence allowance in terms of Section 10A of the Industrial Employment (Standing Orders) Act.

8. To that extent the Appeal is allowed. The impugned orders of the Trial Court and the learned single Judge are set aside. The Official Liquidator who has been added as party to work out the entitlement of the workmen based on the representation in the matter of dues during the period of suspension which will be submitted by the petitioners to the Official Liquidator within a period of eight weeks from today.

(F.I. REBELLO, J.)

(ANOOP V. dMOHTA, J.)